Supreme Court, U.S.
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No. 91-1308

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CONTINENTAL CASUALTY COMPANY,
Petitioner,

v.

UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR, INC., UNR-ROHN, INC. (ALABAMA), UNR-ROHN, INC. (INDIANA), JOBAL TUBE CO., INC., UNR PRODUCTS, INC., LEAVITT STRUCTURAL TUBING CO., and FOLDING CARRIER CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents object to Petitioner's statement of the QUESTIONS PRESENTED FOR REVIEW and submit the following question as properly describing the only matter proposed for review:

Whether the United States Court of Appeals for the Seventh Circuit correctly interpreted Illinois state law in construing an insurance contract between UNR, the insured, and CNA, the insurer, when it held that UNR's transfer of 63% of its stock to asbestos claimants in a bankruptcy proceeding constituted a "judgment" or "settlement" under the applicable provisions of CNA's insurance contract?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Statement of Facts

UNR is a former asbestos manufacturer.[1] (App. 78a) By July 1982, as a result of its manufacture and distribution of asbestos products, UNR was a defendant in

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[1] All Respondents are collectively referred to herein as "UNR." All Respondents' parents and subsidiaries have been named in the caption of this matter: UNR Industries, Inc., UNARCO Industries, Inc., UNR, Inc., UNR-ROHN, Inc. (Alabama), UNR-ROHN, Inc. (Indiana), Jobal Tube Co., Inc., UNR Products, Inc., Leavitt Structural Tubing Co., and Folding Carrier Co. All references to appendix are to the appendix supplied by Petitioner.

12,000 or so lawsuits involving asbestos-related injuries. (App. 4a) Faced with crushing asbestos liabilities, UNR filed for protection under Chapter 11 of the Bankruptcy Code in July 1982. (App. 4a) By February 21, 1989, approximately 105,000 asbestos-related claims had been asserted against UNR. (App. 4a) Damages sought by these asbestos claims exceeded $38,000,000,000.

During UNR's reorganization, insurance coverage actions between UNR and its insurers were filed as adversary proceedings and were later withdrawn by the district court. *UNR Indus., Inc.* v. *Continental Ins. Co.*, 607 F. Supp. 855, 858 (N.D. Ill. 1984). (App. 84a) The dispute in the insurance coverage actions was whether the insurance companies were required to pay for UNR's liability to the 105,000 or so asbestos claimants. After protracted litigation in the district court, including trial, UNR settled with nine of its insurers (App. 2a), leaving just one insurer that continued to ignore its contractual obligations, the Petitioner Continental Casualty Company ("CNA").[2]

UNR emerged from reorganization on June 2, 1989, having spent almost seven years under court supervision fashioning a reorganization plan. (App. 74a) UNR's reorganization was made possible only by the settlement of the approximately 105,000 asbestos claims. In a nutshell, UNR settled the 105,000 asbestos claims for $254,000,000. This arms-length settlement came only after seven years of adversary proceedings over UNR's present and future liability to the asbestos claimants. CNA did not object to UNR's settlement of these claims, although it had the plenary opportunity to do so.

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[2] In the Seventh Circuit, UNR's appeal as to two other insurers arose from policies that could not be located, and involved issues distinct from CNA. UNR's claims as to these two carriers were settled post-appeal and are not at issue here.

As is typical in reorganization proceedings, because UNR did not have sufficient cash or other readily liquid assets to pay the asbestos claimants the amount of the settlement with them, UNR satisfied its settlement obligations to the asbestos claimants by transferring some 63% of its own common stock to the 105,000 asbestos claimants. The mechanism for investing, managing, and distributing funds to the individual asbestos claimants is an entity entirely separate from UNR, the UNR Asbestos-Disease Claims Trust (the "Trust"). In essence, UNR paid over the settlement reached with the asbestos claimants to the Trust, which in turn became obligated to invest, manage, allocate and disburse the settlement proceeds to the 105,000 asbestos claimants. (App. 83a) In June 1989, upon confirmation of UNR's reorganization, approval of this settlement and entry of judgment on the settlement, the Trust received 29,437,004 shares (approximately 63%) of UNR's common stock. (App. 85a) UNR thereupon received an unconditional release for all pending and future asbestos personal injury claims. (App. 83a)

Petitioner CNA issued UNR an Umbrella Excess Third Party Liability Policy, No. RDU 8062037, for the period November 1, 1970 to November 1, 1973 (the "CNA Policy"). (App. 4a) The CNA Policy provides UNR with $5,000,000 of insurance annually for three policy years, for a total of $15,000,000 in comprehensive excess coverage. (App. 4a) The CNA Policy provides that CNA "will indemnify [UNR] for loss in excess of the total applicable limits of underlying insurance." (App. 4a, CNA Policy, "Coverage," ¶ 1) The CNA Policy defines "loss" as "the sums paid as damages in *settlement* of a claim or in satisfaction of a *judgment*." (App. 4a, CNA Policy, "Definitions") (emphasis added) The CNA Policy further provides—in explicit language—that UNR's bankruptcy does not relieve CNA of any insurance obligation. (App. 5a)

Statement of Proceedings

In the district court, UNR contended, and CNA disputed, that the CNA Policy provides insurance coverage for the asbestos claims faced, and ultimately resolved, by UNR. CNA and UNR filed cross-motions for summary judgment arguing their respective interpretations of the CNA Policy. (App. 23a) In its motion, UNR submitted that its payment to the Trust constituted a "judgment or settlement" under the terms of the CNA Policy, thereby invoking CNA's insuring obligations. (App. 24a) Ruling against UNR and in favor of CNA, the district court held that "[t]he transaction by which UNR has conveyed or will convey 63% of its stock to the trust is not a judgment or settlement within the meaning of the CNA policy." (App. 24a) Based on this holding, the district court concluded that "[n]either UNR nor the trust has yet established a basis for excess liability coverage from CNA." (App. 24a) The district court dismissed UNR's complaint against CNA for lack of justiciability. (App. 25a)

On appeal, the Seventh Circuit reversed and remanded for trial on the merits. Applying Illinois law, the Seventh Circuit held (i) that UNR's obligation to transfer stock in satisfaction of the asbestos claims arose upon final confirmation of the reorganization plan; (ii) that the satisfaction of the asbestos claims constituted an "adverse judgment or settlement"; (iii) that in this case the characterization of the payment to the Trust as either a settlement or a judgment was immaterial; and (iv) that this judgment or settlement constituted a "loss," as a matter of law, within the meaning of the CNA Policy language. (App. 4a-5a) Accordingly, based on CNA's contractual language, the Seventh Circuit held that the nature and extent of CNA's insuring obligations were ripe for adjudication by the district court. The Seventh Circuit further determined that the amount of the "loss" to UNR ($254,000,000, representing the amount of the

settlement with the asbestos claimants) was fixed by the arms-length adversary proceedings before the bankruptcy court and that CNA could not later collaterally attack the amount of the settlement. (App. 5a-6a) CNA was at all times aware of UNR's asbestos claims; could have participated in UNR's settlement discussions with the asbestos claimants; and could have challenged the amount and propriety of UNR's settlement with the asbestos claimants had CNA exercised its option to defend these claims. (App. 6a; 7a)

The Seventh Circuit rejected CNA's pinched view of its Policy and its obligations for the asbestos claims settlement and resulting judgments. In most pertinent part, the appellate court examined the "No-Action" clause of the CNA Policy and determined that it did not preclude coverage.[3] (App. 4a) Construing this "No-Action" provision in accordance with Illinois law, the Seventh Circuit held that the nature and scope of "loss" resulting from UNR's plan of reorganization was binding upon CNA as a a"judgment," in which case the amount was finally determined by the plan (App. 5a), or as a "settlement," in which case, under Illinois law, CNA had waived its right to enforce the clause. (App. 6a-7a)

Having construed CNA's policy language to encompass the judgment and settlement effectuated by UNR with the asbestos claimants, the Seventh Circuit remanded the case to the district court for trial, including an adjudication and allocation of CNA's insuring obligations in accordance with Illinois law pursuant to *Zurich Ins. Co.* v. *Raymark Industries, Inc.*, 118 Ill.2d 23, 514 N.E.2d 150 (1987). (App. 15a) The case is currently proceeding in discovery on remand before the district court.

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[3] The "No-Action" provision states that "[n]o action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA]."

SUMMARY OF ARGUMENT

CNA's position is preposterous. All that the Seventh Circuit did was to send the contractual dispute between CNA and UNR to trial in the district court. CNA has not been deprived of any right, due process or otherwise, and it is free to attempt to prove that it has no insuring obligation to UNR. Contrary to CNA's myopic suggestions, the *only* thing that the bankruptcy court did was to estimate and allow claims and approve the settlement between UNR and the asbestos claimants in the course of passing on UNR's successful Chapter 11 plan of reorganization. Estimating and allowing claims, approving settlements among creditors and debtors, and supervising and adopting reorganization plans all fall squarely within the function of the bankruptcy court. CNA's argument, if accepted, would in essence remove the bankruptcy court's ability to approve settlements of tort claims. Restructuring the Bankruptcy Code in such a fashion is neither necessary nor appropriate, especially because CNA remains free to adjudicate the extent of its contractual obligations to UNR.[4]

Moreover, this is purely a contract case. The Seventh Circuit applied settled state law in interpreting a single commercial liability insurance policy between UNR, the insured, and CNA, the insurer, in the context of an asbestos-related insurance dispute. (App. 3a-7a) The Seventh Circuit's opinion (i) did *not* conflict with the decision of another United States court of appeals on the same matter, (ii) did *not* conflict with a state court of last resort, and (iii) did *not* depart from the accepted and usual course of judicial proceedings. Rule 10. CNA's mischaracterizations notwithstanding, there

[4] The Seventh Circuit merely reversed the district court's dismissal of UNR's action against CNA, holding that the settlement between UNR and the asbestos claimants confirms that there is a present and justiciable breach of contract dispute over CNA's obligation to pay for part of the settlement. Indeed, it could readily be contended that CNA's Petition to this Court is not ripe since CNA has not yet been found liable to UNR.

is no federal issue presented by this petition—under the Bankruptcy Code, under any other federal law or under the Constitution—and none of the abstract, hypothetical or analytically dysfunctional questions posed by CNA is properly presented for review, especially at this point in the litigation. (CNA's Petition for Writ of Certiorari, p.i.) The Seventh Circuit's decision was limited to an interpretation of insurance policy language, applying traditional contract principles and applicable state law, in the context of a private contract dispute. The mere fact that this contract dispute arose in the context of a Chapter 11 proceeding has no bearing on the underlying nature of the dispute. And, of course, the Seventh Circuit did not finally or ultimately determine the full extent of CNA's contractual rights or obligations, but rather merely remanded the contractual dispute to the district court where it is still pending.

In sum, the Seventh Circuit's application of Illinois law in the interpretation of a private insurance contract does not raise any issue worthy of this Court's extraordinary jurisdiction, particularly given that Petitioner's insuring obligations are still in litigation.

ARGUMENT

I. THE SEVENTH CIRCUIT DID NOT IMPLICATE ANY FEDERAL LAW OR FEDERAL QUESTION IN INTERPRETING CNA'S INSURANCE POLICY

A. Under The Plain Language Of CNA's Policy And Consistent With Applicable Illinois Law, The Resolution Of UNR's Asbestos Liabilities Was A Judgment Or Settlement That Invoked CNA's Explicit Contractual Obligations

CNA issued excess comprehensive insurance to UNR. (App. 4a) Pursuant to this contract of insurance, CNA agreed to "'indemnify [UNR] for *loss* in excess of the total applicable limits of underlying insurance.'" (App. 4a; quoting CNA Policy, "Coverage," ¶ 1 (emphasis added)) CNA's Policy defines "*loss*" as "'the sums paid

as damages in *settlement* of a claim or in satisfaction of a *judgment*.'" (App. 4a; quoting CNA Policy, "Definitions" (emphasis added))

In the appeal below, focusing on this specific policy language, the Seventh Circuit was asked to determine whether UNR's transfer of stock to the Trust in resolution of asbestos liabilities constituted a "judgment" or "settlement," and therefore a "loss," that triggered CNA's insuring obligations. The court was further asked to determine whether the "No-Action" condition of CNA's Policy served to exclude coverage. Applying Illinois law and insurance policy construction principles, the Seventh Circuit interpreted the explicit language of CNA's Policy to cover UNR's loss. The court held that UNR's transfer of stock to the Trust in satisfaction of asbestos liabilities, and the confirmation of its reorganization proceeding, resulted in a "judgment or settlement" under the terms of the CNA Policy. Accordingly, the Seventh Circuit reasoned, UNR had suffered a "loss" that triggered CNA's insuring obligations. No federal question was raised or determined in interpreting the CNA Policy. (App. 4a-5a)

After determining that UNR had suffered a loss, the Seventh Circuit construed CNA's "No-Action" provision, which was CNA's principal argument for why coverage could not attach. The "No-Action" provision states that:

> "'[n]o action shall lie against [CNA] unless . . . the amount of [UNR's] obligation to pay shall have been finally determined either by judgment against [UNR] or by written agreement of [UNR], the claimant, and [CNA].'" (App. 6a; quoting CNA Policy, "Conditions," ¶ 7)

In rejecting CNA's interpretation of this provision, the Seventh Circuit held that the plan of reorganization was either a judgment or a settlement under the terms of the CNA Policy. (App. 4a) If the confirmation of the plan were deemed to be a judgment, reasoned the court, then the No-Action clause would, by its own terms, permit an

action. Alternatively, if the confirmation of the plan were deemed to be a settlement, then, as noted by the Seventh Circuit, the No-Action clause would appear "on its face" to bar suit against CNA because CNA was not a party to the confirmation plan. (App. 6a) However, the Seventh Circuit held that the No-Action clause would not bar a suit against CNA even if the confirmation were a settlement because, *pursuant to Illinois law*, CNA had waived application of the clause. The critical language from the opinion is as follows:

> "We have not found any Illinois cases dealing with an excess insurer's obligations to participate in settlement so as to avoid waiver of its 'no action' rights. On the facts of the present case, however, we are confident that an Illinois court would hold CNA's 'no action' clause waived." (App. 6a-7a)

The court supported its interpretation of Illinois law by discussing Illinois state cases (App. 7a) and federal cases applying Illinois law. (App. 6a)

The court further considered and rejected CNA's contention that the amount of the loss should equal the amount of "money the Trust actually pays to asbestos victims." (App. 5a) Noting that Illinois law specifically requires a contract of insurance to contain a clause stating that "'[b]ankruptcy . . . of the insured . . . shall not relieve [CNA] of any of its obligations'" (*see* Ill. Rev. Stat., ch. 73, § 1000), the Seventh Circuit held that UNR's loss should be measured by the "valuation of the asbestos claims" prior to the "discounting of the asbestos victims' damages" made necessary by the bankruptcy filing. (App. 5a-6a)[5] This holding was premised entirely upon CNA's policy provisions, Illinois statutory authority, and settled insurance coverage law. The Sev-

[5] The court also cited *Harbor Ins. Co.* v. *Continental Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990), for the proposition that *under Illinois law* "'[t]he point of [liability] insurance policies . . . [is] to eliminate the very solvency risk' that would lead to a settlement limited by the amount of the insured's assets." (App. 5a-6a)

enth Circuit did not rely on bankruptcy or other federal law.

B. CNA's Characterization Of The Seventh Circuit's Decision As Addressing Federal Questions Is Fundamentally Flawed And Its So-Called "Authorities" Are Inapposite

In a transparent attempt to create a federal issue where none exists, Petitioner contends that the Seventh Circuit's interpretation of a commercial liability insurance policy somehow implicates sweeping principles of federal bankruptcy law. (CNA Petition, pp. 12-13) In point of fact, however, the Seventh Circuit simply did what courts of law have done for centuries: it examined disputed contractual language, interpreted the language according to applicable state law, and construed the rights and obligations of the contracting parties. The Seventh Circuit itself framed the scope of its ruling as follows:

> "The threshold question is whether UNR has suffered any 'loss' under [CNA's Policy] provisions. It has. UNR's bankruptcy resulted in a judgment or settlement (which one does not matter) against UNR in the amount of $254 million on the asbestos claims." (App. 4a)

The Seventh Circuit did nothing more than interpret the words "judgment" or "settlement" in the CNA Policy so as to include a transfer of assets effectuated in a bankruptcy reorganization. The court did not hold, or even discuss, whether federal bankruptcy law superseded Illinois contract law or otherwise affected the CNA Policy language.[6]

CNA asserts a contorted description of the Seventh Circuit's opinion to create the illusion that this case

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[6] Indeed, both parties briefed the case as a matter of state law before both the district court and the Seventh Circuit. CNA was certainly content to rely on Illinois state law in seeking to uphold the district court's original ruling, and its *post-hoc* attempt to transform a contract case into a federal matter must be rejected.

presents federal issues under *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and its progeny. However, CNA never even cited *Northern Pipeline* in its briefs to the Seventh Circuit or in its petition for rehearing. Quite obviously, the federal issues set forth in CNA's Petition are an afterthought, having never been presented to the Seventh Circuit for its consideration nor ruled upon in the courts below. When the Seventh Circuit's decision is properly viewed as involving the interpretation of an insurance contract under state law, Petitioner's "Rube Goldberg" characterization crumbles.

CNA's fanciful *Northern Pipeline* argument is based entirely on fundamental mischaracterizations of the Seventh Circuit's opinion, the record below, and applicable principles of Illinois law. (CNA Petition, pp. 12-19) As a starting point, in UNR's reorganization, the bankruptcy court did precisely what it is statutorily mandated to do: it effectuated the orderly satisfaction of claims against UNR in light of UNR's limited proceeds. *See Girardier* v. *Webster College*, 563 F.2d 1267 (8th Cir. 1977); *see also Burlingham* v. *Crouse*, 228 U.S. 459 (1913). One of many claims satisfied in the proceeding was UNR's asbestos liabilities.

Contrary to CNA's arguments—and fatal to its *Northern Pipeline* dreams—the Seventh Circuit did not expand the bankruptcy court order to effect any change in CNA's Policy language or CNA's insuring obligations. In fact, CNA's insuring obligations are currently being tried on remand before the district court. The Seventh Circuit simply held—and properly so—that the reorganization confirmation order imposed a binding obligation on UNR with respect to the asbestos claims and that CNA was bound *by its contract* to recognize the satisfaction of UNR's asbestos liabilities as a "judgment or settlement" in accordance with its own policy terminology. The bankruptcy court did not determine CNA's insuring obligations as petitioner argues; it determined the

nature and extent of UNR's liabilities vis-a-vis the asbestos claimants, which is precisely what a bankruptcy court must do. The determination of UNR's liability is all that is binding on CNA—nothing more, nothing less.

CNA's argument that the withdrawal of the insurance coverage litigation from the bankruptcy court immunized the carrier from a bankruptcy court ruling on UNR's asbestos liabiilties is nonsensical.[7] At the conclusion of UNR's seven-year reorganization, the bankruptcy court entered a confirmation order that was binding on the debtor, UNR. 11 U.S.C. § 1141(a). It was a binding order on UNR that resulted in a "judgment or settlement" for purposes of triggering CNA's insurance obligations. (App. 5a) The bankruptcy court made no ruling regarding CNA's insuring obligations; it properly resolved UNR's liability to the asbestos claimants, which it had the right and obligation to do. Similarly, the Seventh Circuit did not expand in any way the effect of the bankruptcy order; it properly interpreted CNA's policy language to respond to UNR's loss in the bankruptcy proceeding. The extent of CNA's actual insuring obligations, in light of UNR's asbestos liabilities, is now before the district court on remand.

Moreover, CNA's argument that the bankruptcy court somehow overstepped its authority by estimating the value of UNR's asbestos liabilities is similarly unavailing. The bankruptcy court did precisely what it was legislatively empowered and required to do under 28 U.S.C. § 157(b)(2)(B), which was to estimate UNR's asbestos liability for purposes of confirming a plan. *See A.H. Robins, Co.* v. *Piccinin*, 788 F.2d 884, 1012-14 (4th Cir. 1986),

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[7] CNA did not object to the district court keeping this case when it had an opportunity to do so (*UNR Indus. Inc.* v. *Continental Ins. Co.*, 623 F. Supp. 1319, 1331 (N.D. Ill. 1985)), and chose not to participate in the bankruptcy proceeding (App. 6a). Accordingly, CNA's protestations as to the forum it selected to resolve coverage obligations provides no solace.

cert. denied, 479 U.S. 876 (1986); *In re UNR Industries, Inc.*, 45 Bankr. 322, 326 (N.D. Ill. 1984); *In re Johns-Manville Corp.*, 45 Bankr. 823, 825-26 (S.D.N.Y. 1984). The effect on CNA of the bankruptcy court's estimation does not arise from abuse of federal powers, but from CNA's own Policy language that requires the insurer to cover "settlements or judgments."

It is hornbook insurance law that where an insurer denies coverage to its insured, it is thereafter bound by reasonable settlements entered by the insured. The fact that UNR settled its asbestos liabilities in the context of a bankruptcy proceeding does not change this principle. CNA is bound by the resolution of UNR's asbestos liability, not because of overreaching court rulings, but because of its policy language and its refusal to honor its policy obligations.[8]

Petitioner's consent or waiver argument is also erroneously premised. The Seventh Circuit did not, as CNA argues, hold that "CNA's failure to object to or appeal from the confirmation order resulted in a binding determination and a waiver of any objections." (CNA Petition, p. 15) Rather, the court found that the reorganization imposed a binding liability on UNR and, under the settled state law principle of insurance law discussed above, CNA could not relitigate UNR's liability. (App. 5a) When properly viewed, the federal cases cited by petitioner purporting to demonstrate a "conflict" in the lower courts (CNA Petition, pp. 16-17) have no relevance to the Seventh Circuit's rulings. None of the cases relied upon by CNA involves a situation where, as here, an

[8] The following is a sampling of cases applying the well-settled insurance law that a liability insurance carrier, like CNA, is bound by its insured's reasonable settlement of a liability claim when the carrier disputes coverage. *See, e.g., Luria Bros. & Co.* v. *Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091-92 (2d Cir. 1986); *Maneikis* v. *St. Paul Ins. Co. of Illinois*, 655 F.2d 818, 827 (7th Cir. 1981); *Uniroyal, Inc.* v. *Home Ins. Co.*, 707 F. Supp. 1368, 1378-79 (S.D.N.Y. 1988). *See also* App. 6a-7a.

insurance carrier was *contractually bound* to pay a judgment or settlement entered in a reorganization proceeding.[9] Accordingly, there is no conflict.

Petitioner's preclusion and estoppel argument likewise misconstrues the Seventh Circuit's opinion. The Seventh Circuit did not hold, as CNA contends, that the reorganization plan or the confirmation order had "preclusive effect" as to CNA. (CNA Petition, pp. 18 and 21-23) Rather, the court held that, under the terms of the CNA Policy, the bankruptcy reorganization constituted a "judgment or settlement" triggering CNA's obligations. (App. 5a-6a) CNA is bound by this "judgment or settlement" not because of bankruptcy court power, but because of its Policy language and CNA's denial of coverage. Predictably, therefore, none of the cases cited by CNA even involved an insurance contract, much less whether an

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[9] *In re Brickell Invest. Corp.*, 922 F.2d 696, 702 (11th Cir. 1991) (bankruptcy court lacks power in non-core cases to make award of attorneys fees under I.R.S. § 7430 absent consent under 28 U.S.C. § 157(c)(2)); *United States Dept. of Air Force* v. *Carolina Parachute Corp.*, 907 F.2d 1469, 1473 (4th Cir. 1990) (confirmation order *res judicata* as to parties to proceeding); *In re Davis*, 899 F.2d 1136, 1142 (11th Cir. 1990) (bankruptcy court lacks power in non-core cases to make award of attorneys fees under Equal Access to Justice Act absent consent under § 157(c)(1)), *cert. denied sub nom., Gower* v. *Farmers Home Admin.*, 111 S.Ct. 510 (1990); *Latham* v. *Wells Fargo Bank N.A.*, 896 F.2d 979, 984 (5th Cir. 1990) (bankruptcy court decision regarding settlement of lender liability claim not res judicata as to independent lender liability claim of co-borrower guarantor); *In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987) (consent to non-core proceeding inferred from active participation in and failure to object to ongoing proceedings involving breach of licensing agreement); *In re Daniels-Head & Associates*, 819 F.2d 914, 917-18 (9th Cir. 1987) (appellant filed state law contract claim in bankruptcy court and thereby consented to the exercise of its jurisdiction); *In re Southern Indus. Banking Corp.*, 809 F.2d 329, 331 (9th Cir. 1987) (party who participated without objection in bankruptcy court proceedings regarding obligation to pay on a note and possible set-off had consented to the exercise of bankruptcy court's jurisdiction).

insurer's obligations were triggered by "judgment or settlement." Accordingly, for purposes of this case, it is simply irrelevant whether a confirmation order is treated as a consent decree [10] or whether a confirmation order contains any findings of fact. (CNA Petition, pp. 22-23) The confirmation order did not bind or purport to bind CNA; CNA is bound solely by its own insurance contract, its own conduct, and settled principles of state insurance law.

Petitioner's due process argument fails for similar reasons. Contrary to CNA's contentions, the Seventh Circuit did not hold that the confirmation order was binding upon CNA because of the application of *res judicata* or because of a bankruptcy rule. (CNA Petition, pp. 19-20) Rather, the Seventh Circuit held that the order was binding upon UNR and therefore UNR had suffered a "loss" as defined by CNA's Policy. (App. 5a) CNA's insuring obligations were not established by the bankruptcy court order, but by the terms of its insurance contract. The cases cited by Petitioner (CNA Petition, pp. 20-21) are again wide of the mark since none involved an insurance contract obligation. They involve, instead, the issue of whether the confirmation plan of its own force has preclusive effect independent of contractual obligations.[11]

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[10] *Paul* v. *Monts*, 906 F.2d 1468 (10th Cir. 1990), *In re Stratford of Texas, Inc.*, 635 F.2d 365 (5th Cir. 1981).

[11] *In re Howe*, 913 F.2d 1138, 1144-46 (5th Cir. 1990) (lender liability suit arising out of loan transaction barred by res judicata where same loan transaction was subject of prior bankruptcy court proceedings between same parties and was included in confirmed plan); *In re Auto West, Inc.*, 43 Bankr. 761, 764 (D. Utah 1984) (confirmation of plan does not prevent trustee from pursuing through subsequent litigation undisclosed assets of the estate); *Coral Gables First Nat'l Bank* v. *Constructors of Florida, Inc.*, 299 F.2d 736, 740 (5th Cir. 1962) (bankruptcy court had power to permit claims to be adjudicated in state court pursuant to plan of reorganization).

In sum, the Seventh Circuit did not construe the Bankruptcy Code or apply federal law in reaching its conclusions; it properly relied on the law of Illinois, and interpreted the CNA Policy in accordance with that law. (App. 3a) Nothing in the Seventh Circuit's interpretation of Illinois law or of the CNA Policy warrants this Court's review.

II. THERE REMAINS A CASE OR CONTROVERSY BETWEEN CNA AND UNR, AND IT IS PROCEEDING TOWARD TRIAL IN THE DISTRICT COURT

Petitioner's final contention is that the suit between CNA and UNR is premature (CNA Petition, p. 24), and that unless UNR identifies individual claims covered by the CNA Policy, there is no case or controversy. (CNA Petition, p. 26) This contention, however, was properly rejected by the Seventh Circuit. (App. 9a-10a)[12] The case or controversy between UNR and CNA is proceeding toward trial in the district court, where it belongs.

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[12] At the suggestion of the Seventh Circuit (App. 3a n.1), Respondents filed on December 16, 1991, a Fourth Amended and Supplemental Complaint. On January 27, 1992, CNA filed a motion in the district court to dismiss this complaint for lack of federal subject matter jurisdiction. It is sophistic in the extreme for CNA to argue that federal questions of constitutional significance are at issue in this Petition while simultaneously challenging federal jurisdiction below.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition For a Writ of Certiorari.

Respectfully submitted,

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